IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ROBERT J. HICKS,

Petitioner, ORDER

v. 08-cv-0131-bbc

MICHAEL THURMER, Warden,
Waupun Correctional Institution,

Respondent.

Robert Hicks, an inmate at the Waupun Correctional Institution, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the five dollar filing fee. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

As an initial matter, I note that petitioner named the State of Wisconsin as respondent to the petition. In a habeas action filed by a state prisoner, the proper respondent is the state officer having custody of the prisoner. Rule 2 of the Rules Governing Section 2254 Cases. That person is the warden of the Waupun Correctional Institution, Michael Thurmer. I have revised the caption to show Thurmer as petitioner's custodian and respondent and will direct the clerk of court to do the same.

Petitioner challenges his custody resulting from his January 27, 2005 conviction in the Circuit Court for Rock County for five counts of possessing child pornography. Petitioner

contends that he is entitled to federal habeas relief because the trial court erroneously denied his motion to suppress computer evidence without an evidentiary hearing in violation of his constitutional right to fundamental due process. It appears that petitioner has exhausted his state court remedies with respect to this claim and filed his petition within the one-year limitations period.

Under *Stone v. Powell*, 428 U.S. 465, 493-95 (1976), federal courts can not consider Fourth Amendment claims on habeas corpus review in cases where the state allowed petitioner a full and fair opportunity to litigate those claims. Therefore, petitioner may not assert a claim that the trial court erroneously denied his suppression motion. *Id.* (exclusionary rule is social device for deterring official wrongdoing, not personal right of defendants). However, because petitioner appears to contend that he was denied a full and fair opportunity to litigate his Fourth Amendment claim in state court, that claim is sufficient to warrant a response from a state.

Petitioner also seems to be raising another claim related to whether the trial court erred in allowing witnesses to testify about other acts that he committed. Although evidentiary rulings of state trial courts are normally not subject to federal habeas review, petitioner has a cognizable claim if he can establish that the incorrect evidentiary ruling was so prejudicial that it violated his due process right to a fundamentally fair trial, creating the likelihood that an innocent person was convicted. *Dressler v. McCaughtry*, 238 F.3d 908, 914 (7th Cir. 2001); *Thompkins v. Cohen*, 965 F.2d 330, 333 (7th Cir. 1992); *United States ex rel. Bibbs v. Twomey*, 506 F.2d 1220, 1223 (7th Cir. 1974). However, there is nothing in the petition or the court record available electronically showing that petitioner presented such a claim in the state courts. *See*

Consolidated Court Automation Programs (CCAP), WI Circuit Court Access for Rock County case no. 2002 CF 2632 at http://wcca.wicourts.gov (visited Mar. 12, 2008); CCAP WI Supreme Court and Court of Appeals Cases Access for case no. 2005 AP 2785 at http://wcca.wicourts.gov (visited Mar. 12, 2008); Petition, dkt. 1. Before seeking a writ of habeas corpus in federal court, a petitioner must first exhaust any state court remedies that are available to him in state court. 28 U.S.C. § 2254(b)(1)(A); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004). "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c).

Petitioner appears to be alleging that his appellate lawyer is somehow to blame for his failure to present the claim on direct appeal. If this is so, then petitioner can raise the claim in state court by petitioning the Wisconsin court of appeals for a writ of habeas corpus. *State v. Knight*, 168 Wis. 2d 509, 520, 484 N.W.2d 540, 544 (1992). Nothing in the petition or the court record indicates that petitioner has filed a *Knight* petition. Thus, petitioner may still have an avenue of relief available in the state courts.

If in fact petitioner has failed to exhaust, the petition would have to be dismissed without prejudice unless petitioner chooses to delete the unexhausted claim and proceed solely on the exhausted claim. *Rose v. Lundy*, 455 U.S. 509, 510 and 520 (1982). However, if dismissal of the petition is likely to jeopardize petitioner's ability to refile his federal habeas petition within the limitations period, the court has the discretion to stay the petition and place it in abeyance while petitioner exhausts his state court remedies. *Rhine v. Weber*, 544 U.S. 269, 277 (2005).

District courts may issue such an order only in the following limited circumstances: 1) the petitioner has shown good cause for his failure to exhaust his claims first in state court; 2) the unexhausted claims are potentially meritorious; and 3) there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. Id. at 278.

Therefore, in addition to responding to petitioner's first claim, I am directing the state to address the following issues: 1) whether petitioner has exhausted his claim of ineffective assistance of appellate counsel and the underlying claim related to the other acts evidence; and if the answer is no, 2) whether a stay versus an outright dismissal is warranted in this case.

ORDER

IT IS ORDERED that:

1. The clerk of court is directed to change the caption to reflect that Michael Thurmer, Warden, Waupun Correctional Institution is the respondent.

2. The clerk shall serve copies of the petition and this order by mail to Warden Thurmer and to the Wisconsin Attorney General.

3. The state shall file a response to the petition not later than 30 days from the date of service of the petition, showing cause, if any, why this writ should not issue.

If the state contends that any of petitioner's claims are subject to dismissal with prejudice on grounds such as procedural default or the statute of limitations or without prejudice on grounds of failure to exhaust, then it should file a motion to dismiss and all supporting documents within its 30-day deadline. If relevant, the state must address in its supporting brief

the issue of cause, prejudice and staying this action while petitioner exhausts his state court remedies. Petitioner shall have 20 days following service of any such motion within which to file and serve his responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

If at this time the state wishes to argue petitioner's claims on their merits, either directly or as a fallback position in conjunction with any motion to dismiss, then within its 30-day deadline the state must file and serve not only its substantive legal response to petitioner's claims, but also all documents, records and transcripts that commemorate the findings of fact or legal conclusions reached by the state courts at any level relevant to petitioner's claims. The state also must file and serve any additional portions of the record that are material to deciding whether the legal conclusions reached by state courts on these claims was unreasonable in light of the facts presented. 28 U.S.C. § 2254(d)(2). If the necessary records and transcripts cannot be furnished within 30 days, the state must advise the court when such papers will be filed. Petitioner shall have 20 days from the service of the state's response within which to file a substantive reply.

If the state chooses to file only a motion to dismiss within its 30-day deadline, it does not waive its right to file a substantive response later, if its motion is denied in whole or in part. In that situation, the court would set up a new calendar for submissions from both sides.

4. Once the state has filed its answer or other response, petitioner must serve by mail a copy of every letter, brief, exhibit, motion or other submission that he files with this court upon the assistant attorney general who appears on the state's behalf. The court will not docket or

consider any submission that has not been served upon the state. Petitioner should include on each of his submissions a notation indicating that he served a copy of that document upon the state.

5. The federal mailbox rule applies to all submissions in this case.

Entered this 14th day of March, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge